Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 80-585

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LESTER THOMAS MAYNE, JR.,
Petitioner,

v.

STATE OF MARYLAND,
Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Did the Court of Special Appeals err in allowing a retrial on the charge of second degree murder, thereby subjecting Petitioner to trial for the same offense twice?

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STATE OF MARYLAND,
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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND FOR THE FOURTH CIRCUIT

Petitioner, Lester Thomas Mayne, Jr., prays that a Writ of Certiorari issue to review the judgment of the Court of Special Appeals of Maryland, entered in the above-entitled case on May 7, 1980, and that said judgment be reversed.

OPINION BELOW

The opinion of the Court of Special Appeals of Maryland is included as an appendix to this Petition.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Did the Court of Special Appeals err in allowing a retrial on the charge of second degree murder, thereby subjecting Petitioner to trial for the same offense twice?

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Petitioner was found not guilty of murder and found guilty of attempted obstruction of justice. At the time these two verdicts were taken, counsel for defendant objected to the taking of a partial verdict in light of the jury's inability to reach a unanimous verdict as to second degree murder. Defense objection was overruled, the partial verdict was taken, the jury was released and ultimately, after the jury was discharged, a mistrial was declared. The State is now attempting to bring Petitioner to trial on the charge of second-degree murder, based on the identical facts and circumstances that led to Petition-

er's acquittal on the charge of the first murder count. The Court of Special Appeals of Maryland, deciding the case contrary to this Court's decision in *State Ex Rel. Robinson v. Blackburn,* La., 367 So. 2d 360 (1979), held that even though the statutory language of first degree murder includes the lesser offense of second degree murder, and Petitioner was acquitted of first degree murder, that the jury did not intend to include second degree murder, as indicated in its inability to come to a unanimous verdict, and therefore, Petitioner may be retried on the charge of second degree murder.

The Court of Appeals of Maryland denied certiorari on July 3, 1980.

HOW A FEDERAL QUESTION IS PRESENTED

Petitioner appeals from the denial of a hearing to which this Court has held him entitled under the Fifth Amendment to the Federal Constitution.

REASON FOR GRANTING THE WRIT

There is an urgent, ongoing need for constitutionally mandating, in the State of Maryland, the matter of double jeopardy or former jeopardy, as they apply to trials resulting in partial verdicts or mistrials. Surprisingly, nowhere in the Appellate Court decisions in Maryland, are there any perameters or guidelines indicating when a mistrial is officially declared and when the taking of a partial verdict represents the final action on a charging document. So long as this dearth of directive law is allowed to continue, persons coming under the jurisdiction of the criminal justice system of Maryland face constitutional pitfalls of double jeopardy and former jeopardy, which can be remedied by this Court's granting this Petition for Writ of Certiorari. The taking of a partial

verdict from a jury, the Clerk having harkened the jury as to the validity of said partial verdict, should be a final disposition of the matters charged in the counts of the Indictment presented to the jury. Additionally, the acquittal by the jury of the first count charging murder should be a final disposition of the matters and a re-trial for murder violates Petitioner's constitutional rights under the Fifth Amendment of the Constitution of the United States.

THE ACQUITTAL BY THE JURY OF THE FIRST COUNT, WHICH CHARGES PETITIONER, IN THE STATUTORY LANGUAGE, OF HOMICIDE, WAS A FINAL DISPOSITION OF ALL MATTERS CHARGING ANY DEGREES OF HOMICIDE OR MANSLAUGHTER.

Petitioner requests that this Court issue a Writ of Certiorari to the Court of Special Appeals of Maryland and reverse the judgment of that Court.

Petitioner was charged and tried in the Circuit Court for Caroline County on charges arising from the untimely death of his estranged wife, Valerie Ann Mayne. At the close of the evidence, final arguments and advisory instructions of the Court, the jury began its deliberations.

Ultimately, the Court was advised that they (the jurors) were unable to reach a unanimous verdict as to all of the charges, but were capable of rendering a partial verdict. Over objection of defense counsel, the Trial Judge decided to take the partial verdict.

The jury's verdict was not guilty as to murder in the first count and guilty of attempted obstruction of justice. Members of the jury, through their foreman, did, in fact, indicate that they were unable to reach a unanimous verdict as to the second and fifth counts. The former charged homicide in other than the statutory language, the latter alleged Battery.

In light of the fact that second degree murder is a lesser included offense in Maryland, Petitioner's acquittal on the charge of first degree murder precludes retrial of second degree murder. In the case of *State Ex Rel. Robinson v. Blackburn*, supra at 362, sets forth the following language:

> It is also clear that the trial on the first-degree murder charge, to which the defendant had plead not guilty, had progressed beyond the point at which jeopardy attached, i.e., the swearing of the first witness. If the judgment of acquittal of first-degree murder had been by the jury, double jeopardy would clearly have prevented prosecution or sentence for second-degree murder.

A careful reading of the Indictment reveals that in fact, there is basically no difference between the language as set out in Count One and the language set out in Count Two. As to the pertinent part of the language, once we get past the identity of the Kent County Grand Jurors, who on their oath presented the defendant, the language as to what was alleged in Count One and Count Two to have occurred on or about August 9, 1978, in that County, differs minutely in language and Petitioner suggests is redundant as to meaning. If one reads the language in Count One, which alleges the offense, one need only delete five words, viz., ". . . wilfully and of deliberately premeditated . . ." to have the first count read precisely as the second count is set out. The mere fact that the first count contains "wilfully and of deliberately premeditated" does not separate the various degrees of homicide. Count One of the Indictment resulted in an acquittal of the Petitioner after the Trial Judge decided to take a partial verdict from the jury, over objections of Petitioner. In so doing, the jury, we submit, had the force and effect of acquitting the Petitioner of the alleged crime as set out in Count Two.

It is firmly established in Maryland that an indictment charging but a single count in the language of the statute setting forth murder in the first degree, is capable of having several possible verdicts in addition to one on first degree murder. It is possible, when a verdict is couched in the statutory language of first degree murder, for the jury to find the defendant guilty of first degree murder. It is also well established that an indictment worded that way, will support a verdict by the trier of the fact, of murder in the second degree. (See *Blackwell v. State,* 278 Md. 466, which also was taken to the Supreme Court and is cited at 431 U.S. 918, 53 L. Ed. 2d 229.) It is also possible for an indictment so worded, to support a finding of not guilty of murder, but guilty of manslaughter. Of course, a general verdict of not guilty to any of the above enumerated offenses is likewise possible from such an indictment. Article 27, § 616, Annotated Code of Maryland.

Any attempted re-trial predicated on the premise that the first attempt to prosecute Petitioner resulted in a mistrial, must fail, since there was no proper mistrial declared. The Trial Court, over vigorous objection by counsel for the Petitioner, ordered a partial verdict taken as to the first count — homicide; and the seventh count — attempted obstruction of justice. The former resulted in an acquittal and the latter, in a conviction. The record is clear that the jurors were harkened to their verdict by the Clerk, using the following language:

> (The Clerk) Ladies and Gentlemen of the Jury, harken to your verdicts as the Court has recorded it. Your foreman has said that you find the defendant not guilty under Count number one and that find the defendant guilty under Count number seven and so say you all. You may be seated.

Following the verdict taking, the Trial Court announced to the Jury, "You are now finally excused," whereupon the

Jury disbanded, and only as an afterthought, to an emptying courtroom, did the Trial Judge announce that he was declaring a mistrial as to Counts Two and Five.

Further, cases recognizing the possibility of retrial rest on there having been a "declaration of a mistrial." Thus, in summarizing the law, this Court has said:

> Recently in *Cornish v. State, supra,* at 316-320, this Court reviewed the standards to be applied in determining whether the double jeopardy clause would prohibit a retrial of a criminal defendant following an unconsented to *declaration of a mistrial,* reviewed the numerous Supreme Court cases on the subject, and reviewed some of the situations where retrials have been permitted and some of the situations where they have not. We pointed out that since the opinion of Mr. Justice Story in *United States v. Perez,* 9 Wheat, 579, 580, 6 L. Ed. 165 (1824), it has been settled that the constitutional prohibition against double jeopardy permitted a retrial following a mistrial only if there was 'manifest necessity' for the mistrial and that 'ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes.' We also pointed out in *Cornish,* quoting from *United States v. Jorn, supra,* 400 U.S. at 480, that while the Supreme Court has not prescribed strict "categories of circumstances which will permit or preclude retrial," nevertheless, the cases do set forth principles for determining whether *mistrials should be declared* in various types of circumstances." (emphasis added). *Jourdan v. State,* 275 Md. 495, 510 (1975).

Similarly, the Supreme Court has observed:

> This Court has long forwarded the rule of discretion in the trial judge to *declare a mistrial* and to require another panel to try it if the ends of justice will be best served. (emphasis added). *Brock v. North Carolina,* 344 U.S. 424, 427 (1953).

The opinion of the Court below effectively eliminates the long accepted procedure for allowing retrial and ignores the principle that correct procedure must be followed. See, *State v. Pike,* 287 Md. 120 (1980); *Pugh v. State,* 271 Md. 201 (1974).

CONCLUSION

For the above-cited reasons, Petitioner prays that this Court issue a Writ of Certiorari to the Court of Special Appeals of Maryland, and reverse its judgment.

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY, That on this 23rd day of September, 1980, a copy of the foregoing Petition for Writ of Certiorari was mailed to Stephen H. Sachs, Attorney General for the State of Maryland, One South Calvert Street, Baltimore, Maryland 21202.

James R. White

APPENDIX

In the
Court of Appeals of Maryland

Petition Docket No. 170

September Term, 1980

(Nos. 890 & 930, September Term, 1979
Court of Special Appeals)

Lester Thomas Mayne, Jr.

v.

State of Maryland

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ROBERT C. MURPHY,
Chief Judge.

Date: July 3, 1980.

In The
Court of Special Appeals of Maryland

No. 890 and 930

September Term, 1979

Lester Thomas Mayne, Jr.

v.

State of Maryland

Gilbert, Chief Judge, Morton, Thompson, Judges

Opinion by Thompson, J.

Filed: May 7, 1980

On August 9, 1978, the body of Valerie Anne Mayne was found at her home at Rock Hall, Kent County, Maryland. The home was owned by her estranged husband, Lester Thomas Mayne, Jr., the appellant. An autopsy revealed that death was caused by a single stab wound to the abdomen. A knife was discovered near the body by the officers who arrived in response to a telephone call from the appellant. On August 15, 1978, appellant insisted that his attorney inform the police that the knife found by the officers was not the same knife he had discovered when he found his wife's body because that knife had been removed by him. He had thrown it into Swan Creek from the vessel

upon which he was living and which was docked nearby. The officers discovered the knife at the location described.

Appellant testified at trial that at or about 2 or 2:30 a.m. on August 9, he left the Village Tavern with his wife, after having a few drinks. At that time he was not intoxicated. After they arrived at her home they talked for approximately half an hour; after which he went to his boat. He remained on the boat for 15 or 20 minutes and then went back to the house where he found his wife "sitting in the living room on the couch crying." At that time, appellant told his wife that he wanted to end their marriage. He then left the house and returned to his boat. After staying on the boat for a brief period he again returned to the house. Upon his arrival he found his wife lying on the floor bleeding. He picked up a knife that was lying near her and threw it overboard when he went back to his boat. He then went to bed. Upon awakening, he returned to the house and started thinking about what he had done. He said, "I had taken away the knife and I knew it would look pretty bad on me." He then went to the kitchen, got a knife out of the drawer, put some of his wife's blood on it, and threw it on the floor. He stated he was sober at that time. He testified that when he initially discovered the body, he was upset and thought in his confused state of mind that by discarding the knife, no one would see that she had hurt herself.

On September 6, 1978, he was indicted in a seven count indictment charging (1) murder in the first degree; (2) murder in the second degree; (3) manslaughter; (4) assault with intent to murder; (5) assault and battery; (6) making a false statement to the police; and (7) attempted obstruction of justice. The case was tried in the Circuit Court for Caroline County to which it had been removed. The trial judge, K. Thomas Everngam, submitted to the jury counts 1, 2, 5 (as to battery) and 7. The other counts were either *nolle prossed* by the State or dismissed by the court. When the jury returned its verdict, the following occurred:

"(The Court) Gentlemen, we have received another note, which we have read to you in Chambers. 'We may have mislead you, we have reached a verdict on Counts one and seven, but are deadlocked on Count two and fear we can not come to a unanimous decision.'"

* * * * * *

"(The Court) It is the Court's ruling that we have instructed them that they can rule on Count seven no matter how they have ruled on the previous Counts, guilty or not guilty. We therefore, will take a partial verdict on the first and seventh Counts."

* * * * * *

"(The Clerk) Lester Thomas Mayne, Jr., please stand and raise your right hand.

Ladies and Gentlemen of the jury, look upon the defendant at the bar. What say you, Mr. Foreman, do you find the defendant guilty or not guilty of the matter whereof he stands charged on Count one, to wit, murder in the first degree?

(The Foreman) Not guilty.

(The Clerk) What say you, Mr. Foreman, do you find the defendant guilty or not guilty on Count number seven, to wit, attempt to obstruct justice?

(The Foreman) Guilty.

(The Court) Now, Mr. Foreman, do we understand from your notes that you are unable to come to a verdict on Counts two and five; is that correct?

(Mr. Foreman) That is correct, sir."

After the jurors were harkened unto their verdict, they were excused. Thereafter the State's Attorney inquired of the court as to whether or not there was anything officially in the record with respect to a mistrial as to the remaining counts, whereupon the court declared a mistrial as to count 2, murder in the second degree, and count 5, battery. Appellant received a five year sentence for attempted obstruction of justice.

Thereafter the case was moved to the Circuit Court for Cecil County, (Mackey, J.), where a motion to dismiss counts 2 and 5 on the basis of double jeopardy was denied. In this consolidated appeal, appellant alleges that his conviction for obstruction of justice in the Circuit Court for Caroline County was improper and that the denial of his motion to dismiss by the Circuit Court for Cecil County was in error.

We will answer the contentions in inverse order.

I. Double Jeopardy

Appellant first argues that although Maryland Rule 759 d permits the court to take a partial verdict in a criminal case and provides that an accused may be retried on any count upon which the jury did not agree, in this case retrial should not be permitted because the trial judge did not state there was a mistrial until after the jury had been discharged. The argument not only lacks supporting authority but it lacks logic as well. The rule itself provides that there is a mistrial if the jury does not agree on all counts and, thus, the declaration by the court was entirely superfluous.[1]

Appellant argues secondly that having been acquitted of the first count which set forth the statutory language of first degree murder, he should by operation of law be found not guilty of second degree murder. He relies on *Blackwell v. State,* 278 Md. 466, 365 A.2d 545 (1976), *cert. denied,* 431 U.S. 918 (1977), which stated that murder indictment for first degree murder also included charges of second degree murder and manslaughter. He argues that double jeopardy precludes another trial. He cites a long line of Maryland cases ending with *Bennett v. State,* 229 Md. 208, 182 A.2d 815 (1962), to show that once an

[1] Rule 759 d states:

"When there are two or more counts, the jury at any time may return a verdict with respect to a count as to which it has agreed, and any count as to which the jury cannot agree, may be tried again."

accused is acquitted he cannot be retried. The fallacy with this argument is that there was no acquittal as to murder in the second degree. The law is well settled that "[w]here the meaning of the verdict is so unmistakable, mere inartificiality in its form will not be sufficient to defeat justice by nullification of a verdict which plainly declared the intent of the jury . . .". *Simmons v. State,* 165 Md. 155, 169, 167 A. 60 (1933); *Barber v. State,* 16 Md. App. 235, 241, 295 A.2d 814 (1972). In the instant case, the intent of the jury could not be more clear.[2]

In *Powers v. State,* 285 Md. 269, 401 A.2d 1031 (1979), *cert. denied,* ____ U.S. ____ (19), the Court extended the doctrine of collateral estoppel as set forth in *Ashe v. Swenson,* 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970), to cover a single trial where the jury was unable to agree on a verdict as to one count but acquitted on other counts, having a common issue of ultimate fact. This extension is of no help to the appellant because in the instant case there was no determination of any ultimate fact that would require the appellant's acquittal for second degree murder. It is apparent that all that the jury decided was that appellant did not premeditate his wife's killing.

II. Attempt to Obstruct Justice

Appellant presents two arguments for reversal of his conviction for attempted obstruction of justice. First, he argues that the trial judge erred by his failure to instruct the jury that suicide is not a crime in Maryland. Appellant argues the failure to give the instruction was improper because the appellant could not have been convicted of an attempt to obstruct justice if his wife had committed suicide, because suicide is not a crime in Maryland. We do

[2] Retrial on second degree murder is possible even under a single count murder indictment. In Rasnick v. State, 7 Md. App. 564, 571, 256 A.2d 543 (1969), *cert. denied,* 257 Md. 735, *cert. denied,* 400 U.S. 835 (1970), this Court stated: "Even though a retrial on murder in the first degree is precluded under some circumstances, e.g. an acquittal at the first trial, that does not mean the accused cannot be retried for second degree murder or manslaughter under the same indictment."

not see it that way. Under *Md. Code,* Art. 22, § 6, a medical officer, the police officers, and the State's Attorney are charged with the investigation of any death that is suspicious or unusual whether or not a crime has been committed. Appellant's actions in substituting the knife and giving false reports to the police department would have obstructed justice whether or not suicide is a crime in Maryland or whether or not the wife committed suicide in the instant case. *See Md. Code,* Art. 27, § 27.

The appellant next contends that the trial judge committed error in instructing the jury they could consider possible intoxication of the defendant prior to, and at the time of, the crime only as applied to first degree murder. The trial judge's statement of the law was inaccurate because any attempt to commit a crime requires a specific intent. Perkins, *Criminal Law,* 573 (2d ed. 1969). The error was of no importance, however, because appellant admitted he was sober at the time he put the substitute knife near his wife's body and at the time he falsely advised the police of what happened that morning. The testimony as to intoxication at the time he removed the knife was not sufficient to show that he was "so drunk that he is unable to formulate that *mens rea.*" *State v. Gover,* 267 Md. 602, 606, 298 A.2d 378, 381 (1973). There is no need for a trial judge to give an instruction unless it is supported by the evidence. *Tripp v. State,* 36 Md. App. 459, 463, 374 A.2d 384, *cert. denied,* 281 Md. 745 (1977).

Judgment affirmed in No. 890. Order affirmed in No. 930. Case remanded for trial. Appellant to pay the costs.

No. 80-585

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ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

1. Whether the petition for writ of certiorari to review the judgment of the Court of Appeals of Maryland is timely filed?

2. Whether the Court of Special Appeals of Maryland correctly decided that the trial court properly denied the motion to dismiss the indictment charging Petitioner with second degree murder?

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PRELIMINARY COMMENT

This Brief in Opposition to petition for writ of certiorari is filed pursuant to the request of this Honorable Court.

OPINIONS BELOW

On May 7, 1980, the Court of Special Appeals of Maryland affirmed Petitioner's conviction of obstruction of justice in Case No. 890 and remanded Case No. 930 for trial on charges of second degree murder and battery. *Mayne v. State*, 45 Md. App. 483 (1980). On July 3, 1980, the Court of Appeals of Maryland filed an order denying the petition of Mayne for a writ of certiorari. From that order, as well as the reported opinion of the Court of Special Appeals, the Petitioner has applied to this Honorable Court for a writ of certiorari.

JURISDICTION OF THE COURT

Petitioner has invoked the jurisdiction of this Honorable Court pursuant to the provisions of 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

Petitioner contends that Amendment V of the United States Constitution is involved.

STATEMENT OF THE CASE

Petitioner was indicted in a seven count indictment in the Circuit Court for Kent County charging: (1) murder in the first degree; (2) murder in the second degree; (3) manslaughter; (4) assault with intent to murder; (5) assault and battery; (6) making a false statement to the police; and (7) attempted obstruction of justice. At the conclusion of evidence, Counts One, Two, Five (as to battery), and Seven were submitted to the jury. Following approximately eight hours of deliberation, the jury advised the trial court that it had reached a verdict on Counts One (first degree murder) and Seven (obstruction of justice),

but was deadlocked on Counts Two (second degree murder) and Five (battery). The trial court then decided to take a partial verdict with respect to Counts One and Seven, as prescribed by Maryland Rule 759d.[1] The following occurred when the jury returned it verdict:

> "(The Court): Gentlemen, we have received another note, which we have read to you in Chambers. 'We may have misled you, we have reached a verdict on Counts one and seven, but are deadlocked on Count two and fear we can not come to a unanimous decision.'
>
> * * * * * *
>
> (The Court) It is the Court's ruling that we have instructed them that they can rule on Count seven no matter how they have ruled on the previous Counts, guilty or not guilty. We therefore, will take a partial verdict on the first and seventh Counts.
>
> * * * * * *
>
> (The Clerk) Lester Thomas Mayne, Jr., please stand and raise your right hand.
>
> Ladies and Gentlemen of the jury, look upon the defendant at the bar. What say you, Mr. Foreman, do you find the defendant guilty or not guilty of the matter whereof he stands charged on Count one, to wit, murder in the first degree?
>
> (The Foreman) Not guilty.
>
> (The Clerk) What say you, Mr. Foreman, do you find the defendant guilty or not guilty on Count number seven, to wit, attempt to obstruct justice?
>
> (The Foreman) Guilty.
>
> (The Court) Now, Mr. Foreman, do we understand from your notes that you are unable to come to a verdict on Counts two and five, is that correct?
>
> (Mr. Foreman) That is correct, Sir."

[1] Maryland Rule 759d provides:

> "When there are two or more counts, the jury at any time may return a verdict with respect to a count as to which it has agreed, and any count as to which the jury cannot agree, may be tried again."

Following the taking of verdicts on Counts One (first degree murder) and Seven (obstruction of justice), the jury was excused. The State then asked the Court whether there was naything officially in the record with respect to a mistrial on Counts Two (second degree murder) and Five (battery). A mistrial was officially declared as to Counts Two and Five. Thereafter, Petitioner received a five year sentence for attempted obstruction of justice. The case was then removed to the Circuit Court for Cecil County, where Petitioner moved to dismiss Counts Two and Five on the basis of double jeopardy. The motion was denied. On an interlocutory appeal to the Maryland Court of Special Appeals, Petitioner argued, *inter alia,* that the denial of his motion to dismiss by the Circuit Court for Cecil County was improper.

ARGUMENT

I.

THE PETITION FOR WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE COURT OF APPEALS OF MARYLAND IS NOT TIMELY FILED.

Rule 20.1 of the *Rules of the Supreme Court of the United States* provides that "A petition for writ of certiorari to review the judgment in a criminal case of a state court of last resort . . . shall be deemed in time when it is filed with the Clerk within 60 days after the entry of such judgment." Rule 20.4 provides that "The time for filing a petition for writ of certiorari runs from the date the judgment . . . sought to be reviewed is rendered." The order of the Court of Appeals of Maryland denying the Peitioner's writ of certiorari in that Court issued on July 3, 1980. *See* Appendix to Petition at 1a. The petition docket of this Court shows that the instant petition was filed on September 24, 1980, beyond the 60 day period prescribed by Rule 20.1. The petition was not timely filed and should not therefore be considered by this Honorable Court.

II.

THE COURT OF SPECIAL APPEALS OF MARYLAND CORRECTLY DECIDED THAT THE TRIAL COURT PROPERLY DENIED THE MOTION TO DISMISS THE INDICTMENT CHARGING PETITIONER WITH SECOND DEGREE MURDER.

Petitioner contends that principles of double jeopardy prohibit his retrial on the charge of second degree murder. He argues first that the prior acquittal of him on the charge of first degree murder was tantamount to an acquittal of the second degree murder charge, thus barring a second prosecution for second degree murder. Alternatively, he argues that retrial should not be permitted because the trial judge did not declare a mistrial until after the jury had been discharged. The Court of Special Appeals rejected each of these contentions. With respect to Petitioner's initial contention, the Court of Special Appeals held that a retrial on the second degree murder charge is not barred by double jeopardy because there was no acquittal as to murder in the second degree, there being ". . . no determination of any ultimate fact that would require the [Petitioner's] acquittal of second degree murder." *Mayne v. State,* 45 Md. App. at 487, 488. In the opinion of the Court of Special Appeals, Petitioner's second contention lacked both supporting authority and logic as well, since the mistrial in this case occurred the moment the trial court, on its own motion pursuant to Maryland Rule 759d, took a partial verdict on Counts One and Seven, following the jury's inability to reach a verdict on Counts Two and Five. The trial court's mere failure to declare formally the fact of the mistrial in the jury's presence did not, therefore, render the mistrial illegal. Each of these issues was properly decided by the Court of Special Appeals of Maryland.

In Maryland, the common law offense of murder still obtains, and the term "murder" as used in Maryland criminal statutes is one "recognized as a general de-

nomination including offenses differing from each other in degree of atrocity, but not in their nature and kind . . . the measure of punishment only is sought to be graduated according to the circumstances under which it was committed." *Davis v. State,* 39 Md. 353, 374 (1874). See also *Smith v. State,* 41 Md. App. 277, 294 (1979). Maryland Code, Article 27, § 407 provides, *inter alia,* that all murder "prepetrated . . . by any kind of willful, deliberate and premeditated killing should be murder in the first degree." Maryland Code, Article 27, § 411 provides that "all other kinds of murder shall be deemed murder in the second degree." In this case, the indictment charged Petitioner separatedly with first degree murder in Count One and with second degree murder in Count Two.[2] In pertinent part Count One charged that Petitoner ". . . on or about August 9, 1978 in [Kent County, Maryland] unlawfully, wilfully and of deliberately premeditated malice aforethought, did kill and murder Valerie Ann Mayne . . ." Count Two in pertinent part charged that Petitioner ". . . unlawfully with malice aforethought, did kill and murder Valerie Anne Mayne . . ." It follows logically, that where, as here, the charges of first and second degree murder are separately charged and submitted to the jury, an acquittal on the first degree murder charge means only that the murder was not accomplished "by any kind of wilful, deliberate and premeditated killing". Such an acquittal does not mean, however, that the killing was not murder. See *Rasnick v. State,* 7 Md. App. 564, 571 (1969). The Court of Special Appeals was thus correct in holding

[2] In Maryland it is not necessary to charge a person separately for first and second degree murder. Md. Code, Art. 27, § 616 provides the statutory form of indictment for murder as follows:

> "That A.B. on the ___ day of _____, at the County aforesaid feloniously (wilfully and of deliberately premeditated malice aforethought) did kill (and murder) C.D. . . ."

Under this form of indictment an accused may be found guilty of murder in the first degree, murder in the second degree or manslaughter. *Carrol v. Warden,* 205 Md. 631 (1954).

that the defense of former jeopardy did not bar a retrial on the second degree murder charge. This decision comports with this Court's recent exegesis of double jeopardy jurispurdence, which recognizes that the common law plea of *autrefois acquit* is at the core of the protections afforded by the double jeopardy clause. Only when the jury's verdict or the trial court's ruling "actually represents a resolution [in the defendant's favor] correct or not of some or all of the factual elements of the offense charged, can a defendant successfully plead former jeopardy." *United States v. Martin Linen Supply Company*, 430 U.S. 564, 571 (1977). See also *United States v. Wilson*, 420 U.S. 332 (1975) and *United States v. Scott*, ___ U.S. ___, 98 S. Ct. 2187 (1978). Here, the jury's acquittal of Petitioner on the first degree murder charge represents a finding in Petitioner's favor that he did not premeditate the murder. Whether or not a murder was committed could not, however, be resolved by the jury. This legal fact is fatal to Petitioner's double jeopardy claim.

Nor can Petitioner derive succor from this Court's decision in *Green v. United States*, 355 U.S. 184 (1957), where the jury had submitted to it charges of first degree murder and second degree murder. It returned a verdict of guilty of murder in the second degree but was silent as to the first degree murder charge. This Court held that the jury's silence on the first degree murder charge operated as an "implicit acquittal" of that offense, which barred a reprosecution of the first degree murder charge. It is readily apparent that this case is factually and doctrinally distinguishable from *Green*. Significant in *Green* was this Court's finding that there was no manifest necessity to declare a mistrial on the first degree murder charge, since there was not even an inquiry to the jurors as to whether they were unable to reach a verdict on that charge. Similarly, in *State Ex Rel. Robinson v. Blackburn*, 367 So. 2d 360 (La. 1979), a case relied upon by Petitioner, the

trial court directed a verdict of acquittal on the charge of first degree murder on the grounds that the State had failed to adduce sufficient evidence. Following this and before the jury was discharged the State amended the indictment to charge second degree murder and the defendant pleaded guilty to this charge. Since the original indictment did not charge second degree murder the Supreme Court of Louisiana reasoned that the acquittal of first degree murder served to acquit the defendant of second degree murder, a lesser included offense. This decision was primarily decided on the basis of La. Code of Criminal Procedure, Art. 596(1) which provided:

> "Double jeopardy exists in a second trial only when the charge in that trial is (1) identical with or a different grade of the same offense for which the defendant was in jeopardy in the first trial, whether or not a responsive verdict could have been rendered in the first trial as to the charge in the second trial."

Here, as noted, the Petitioner was charged separately with first and second degree murder and each charge was submitted to the jury. The jury deliberated for a period of approximately eight hours and was unable to reach a verdict on Counts Two (second degree murder) and Five (battery), advising the trial court that it was "hopelessly deadlocked". In these circumstances, the trial court did not abuse its discretion in taking a partial verdict, as expressly provided in Md. Rule 759d. Indeed these circumstances constitute the *sine qua non* of classic manifest necessity under *United States v. Perez,* 22 U.S. (9 Wheat.) 579, 580 (1824). Accordingly, Petitioner may again be put upon to defend the second degree murder charge without contravening the double jeopardy clause.

Petitioner alternatively argues that this Court should review this case to set "perameters [sic] or guidelines indicating when a mistrial is officially declared and when the taking of a partial verdict represents the final action

on a charging document." (Petition at page 3). According to Petitioner, the mistrial in his case was illegal because it was not officially declared until after the jury was dismissed. The Court of Special Appeals, in deciding this issue, held pursuant to Maryland Rule 759d, that where two or more counts are to be decided by the jury, a partial verdict may be returned as to the counts upon which the jury has agreed; any counts as to which the jury cannot agree may be tried again. The acceptance of the partial verdict pursuant to Maryland Rule 759d is thus tantamount to the declaration of a mistrial; therefore, in the opinion of the Court of Special Appeals, the formal declaration of a mistrial was "entirely superfluous". *Mayne v. State,* 45 Md. App. at 487. Respondent submits that this holding is correct. The operative fact causing the mistrial in this case was the jury's failure to agree upon a verdict on Counts Two and Five. In *United States v. Perez,* 22 U.S. at 528, this Court made plain that a jury's inability to reach a verdict constitutes the requisite manifest necessity for a mistrial. This concept is well-defined in the law. See *e.g. Wade v. Hunter,* 336 U.S. 684 (1949); *Simmons v. United States,* 142 U.S. 148 (1891); and *Arizona v. Washington,* 434 U.S. 497 (1978). It is likewise well-settled that where a jury renders a partial verdict on an indictment containing more than one count, a defendant may be retried on the counts upon which the jury was unable to agree. *Selvester v. United States,* 170 U.S. 262 (1898). Maryland Rule 759d merely codifies each of these well-settled principles. Quite clearly then, the circumstances which may give rise to a mistrial in criminal cases involving a jury's inability to reach a verdict on all counts of an indictment, are well-defined in the law, and a further explication thereof by this Honorable Court is not warranted.

CONCLUSION

For the aforegoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari to the Court of Special Appeals of Maryland should be denied.

Respectfully submitted,

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